

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**FEBRUARY 3, 1998**

Marilyn L. Graves  
Clerk, Court of Appeals  
of Wisconsin

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

**No. 97-1647-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**TERRY LEE PAUL,**

**DEFENDANT-APPELLANT.**

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APPEAL from orders of the circuit court for Buffalo County:  
DANE F. MOREY, Judge. *Affirmed.*

Before Cane, P.J., Myse and Hoover, JJ.

PER CURIAM. Terry Lee Paul appeals orders denying his motion for modification of his twenty-five-year sentence and denying his motion for reconsideration. Paul requested that his twenty-five-year sentence for armed robbery be reduced to fifteen years to run concurrent with a fifteen-year burglary sentence based on “new factors.” Because Paul did not establish any new factors

justifying a reduction of sentence, the trial court properly denied the motion without a hearing.

To establish grounds for modification of sentence based on new factors, Paul was required to show a fact or set of facts highly relevant to the imposition of sentence but unknown to the trial judge at the time of the original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties. *See Rosado v. State*, 70 Wis.2d 280, 288, 234 N.W.2d 69, 73 (1975). Discovery of a fact that the sentencing court could have considered at sentencing but did not does not satisfy this standard. *See State v. Michels*, 150 Wis.2d 94, 99-100, 441 N.W.2d 278, 280 (Ct. App. 1989). Rather, the new factor must be an event or development that frustrates the purpose of the original sentence. It must strike at the very purpose of the sentence selected by the trial court. *Id.*

Paul's motion does not identify any fact or development highly relevant to the imposition of the sentence or that frustrates the purpose of the original sentence. His motion states that he has been selected for transfer to a county jail in Texas. He contends that this transfer would frustrate the rehabilitative purpose of his sentence and that the trial court could not have intended to place him outside this state or in a county jail at the time it imposed the sentence. Paul's rehabilitative needs were not the major sentencing factor, and his sentence was not premised on an assumption of placement in any particular facility. Moreover, where an inmate spends his prison time and the location and timing of rehabilitative programs are not subject to judicial review by a motion to modify the sentence.

Paul contends that his exemplary conduct in the prison constitutes a new factor. A defendant's prison record and progress are not new factors justifying sentence modification, but are matters that should be considered by the parole board. See *State v. Ambrose*, 181 Wis.2d 234, 240, 510 N.W.2d 758, 761 (Ct. App. 1993). Contrary to Paul's assertion, *State v. Carter*, 208 Wis.2d 142, 560 N.W.2d 256 (1997), does not provide any basis for relief. In *Carter*, the court held that conduct in the prison is relevant to "resentencing." Sentence modification and resentencing are not comparable circumstances, because they rest on fundamentally distinct bases.

Paul argues that his mistaken assignment by the Department of Corrections to the Department of Intensive Sanctions and subsequent correction of that mistake constitutes a new factor. The record does not indicate that the trial court expected Paul to be placed in the DIS program at the time of the initial sentence. Therefore, the department's decisions regarding DIS eligibility were not highly relevant to the sentence imposed and do not frustrate the purpose of the sentence.

Paul argues that the trial court did not afford him an opportunity to respond to the State's memorandum opposing modification of his sentence. In his motion for reconsideration, however, Paul had an opportunity to raise the alleged "discrepancies" that he claims existed. Furthermore, Paul has presented no argument to this court that would establish a basis for granting sentence modification had he been given an opportunity to respond to the State's memorandum. We conclude that Paul was given a meaningful opportunity to present his case and that he has established no prejudice from the trial court's failure to allow a reply memorandum.

Paul also argues that the program review committee denied him due process when it ordered his transfer to a Texas county jail. This issue was not raised in the trial court and will not be considered for the first time on appeal. *See State v. Caban*, 210 Wis.2d 598, 605, 563 N.W.2d 501, 505 (1997). In addition, these procedures are not related to sentencing, and a reduction of the sentence would not be an appropriate remedy for any due process violation of the program review committee.

Finally, Paul argues that the trial court failed to credit him with 339 days of jail time. This issue was also raised for the first time on appeal and will not be considered. Paul argues that he was not given an opportunity to present this issue in the trial court. The issue is not mentioned in Paul's motion. The record does not support his assertion that he was not allowed to raise a sentence credit issue. In addition, the record does not establish that Paul followed the procedures for sentence credit set out in § 973.155(5), STATS.

*By the Court.*—Orders affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

